

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEON HOWARD ANDERSON,

Defendant-Appellant.

UNPUBLISHED

January 20, 2011

No. 293859

Kent Circuit Court

LC No. 09-001098-FH

Before: MURRAY, P.J., and HOEKSTRA and SERVITTO, JJ.

SERVITTO, J. (*concurring*).

I concur in the result only, because I believe that evidence admitted pursuant to MRE 404(b) should have been excluded. According to *People v Vandervliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), in order to admit other acts evidence the trial court must determine that the evidence is offered for a proper purpose under MRE 404(b), that the evidence is relevant, and that the probative value of the evidence is not substantially outweighed by unfair prejudice. Further, the trial court may, upon request, provide a limiting instruction to the jury. *Id.*

Citing *Vandervliet*, in *People v Knox*, 469 Mich 502, 674 NW2d 366 (2004) our Supreme Court considered whether evidence that the defendant had an anger issue was admissible under MRE 404(b). In that case, the defendant was charged with the death of his four month old son. The child died from being severely shaken and from blunt force trauma to his head. At trial, the child's mother testified that she had many angry arguments with the defendant and that during these arguments, the defendant shouted, kicked objects and, on one occasion, shoved her. The child's mother further testified that she told the defendant he needed to get help for his anger. The Court ruled that the evidence of the defendant's past demonstrations of anger were not relevant to any material fact at issue and that, nothing about the evidence offered demonstrated any prior acts by the defendant that were similar to the acts that were determined to have caused the child's injuries. The Court found that "the evidence of defendant's past anger could only serve the improper purpose of demonstrating that he had the bad character or propensity to harm his son." *Id.* at 512-513.

The challenged 404(b) evidence in this matter concerns defendant's prior acts and convictions of CSC. As in *Knox*, the evidence of defendant's acts of CSC was not relevant to any material fact in this case, and there are no similarities with respect to defendant's prior

convictions and the charge in the instant matter that would support an inference that defendant intended to sexually assault the victim.

The acts of CSC occurred more than 17 years before he was charged in the instant matter. There is no dispute that the acts amounting to defendant's CSC charges were perpetrated by defendant on girls he knew well, and that all were under the age of 14. Additionally, the acts occurred in defendant's home, generally at night while the girls were sleeping, and involved no concealment of defendant's identity and no violence, such as beating or kicking, on defendant's part.

In distinct contrast, in the present matter, defendant and the 19-year-old victim were unfamiliar to each other. Defendant, who was not near his home and was concealed in a ski mask, approached the victim in broad daylight while driving his vehicle. When the victim refused defendant's order to get in his vehicle, defendant began violently beating and kicking the victim. While the majority in this matter found that the challenged evidence was properly offered to show defendant's intent, the only remote similarity between defendant's prior bad acts is that the victims were arguably younger girls. Lacking any other similarity, it is a considerable leap to conclude that defendant intended to sexually assault the victim in the manner in which he had previously sexually assaulted younger girls. Defendant could have intended to engage in any number of felonious acts against the victim, such as robbery or kidnapping. The fact that that defendant was previously convicted of CSC does not make it more probable that defendant committed the instant assault or help ascertain his intent. The admission of the evidence served to simply paint defendant as a person of bad character, with the propensity to commit the instant offense. The evidence was thus not relevant, nor was it offered for a proper purpose. See, *People v Pattison*, 276 Mich App 613, 616-617; 741 NW2d 558 (2007).

For the same reasons as set forth above, the evidence was also unfairly prejudicial. That being said, I also believe that the erroneous admission of the evidence was harmless due to other overwhelming evidence of defendant's guilt. I therefore agree that reversal is unwarranted.

/s/ Deborah A. Servitto